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OFFICE OF GOVERNMENT ETHICS

5 CFR Parts 2611 and 2638

RIN 3209-AA56

Guidance Documents Issued by the Office of Government Ethics

AGENCY: Office of Government Ethics.

ACTION: Final rule.

SUMMARY: Pursuant to Executive Order 13891, the U.S. Office of Government Ethics (OGE) is issuing a regulation to detail the process for the issuance of, modifications to, and petitions regarding guidance documents, as they are defined by the Executive Order. Additionally, the regulation states that OGE will post all guidance documents in a new guidance portal on its website. OGE is also detailing the process for the issuance of significant guidance documents and categorical exclusions. Finally, OGE is revising its executive branch ethics program regulation to ensure the consistency in the description of various documents that OGE issues.

DATES: This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Patrick J. Lightfoot, Assistant Counsel, or Margaret Dylus-Yukins, Assistant Counsel, U.S. Office of Government Ethics, Telephone: 202-482-9300.

SUPPLEMENTARY INFORMATION:

I. Background

The U.S. Office of Government Ethics (OGE), following consultation with the Office of Management and Budget (OMB), is issuing a new regulation at 5 CFR part 2611 and amending pertinent sections of its executive branch-wide ethics regulations on the executive branch ethics program, as codified at 5 CFR part 2638, in order to establish the policies and procedures for OGE guidance documents issued or revised after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

5 CFR Part 2611 – Guidance Document Procedures

OGE is issuing a new 5 CFR part 2611, following consultation with OMB, to satisfy the requirements of Executive Order 13891, titled “Promoting the Rule of Law Through Improved Agency Guidance Documents” (October 9, 2019). Pursuant to Executive Order 13891, Federal agencies are required to finalize or amend regulations that set forth processes and procedures for issuing guidance documents.

Subpart A includes general provisions applicable throughout part 2611, including the purpose of the regulation, applicable definitions, and a statement that the regulation does not create any private right of action nor right to judicial review. OGE, in consultation with OMB, defines “guidance document” as any statement of agency policy or interpretation concerning a statute, regulation, or technical matter within the jurisdiction of the agency that is intended to have general applicability and future effect, but which is not intended to have the force or effect of law in its own right and is not otherwise required by statute to satisfy the rulemaking procedures of the Administrative Procedure Act. The vast majority of OGE issuances are excluded from the definition of

guidance documents because, among other reasons, they are directed to other executive branch agencies or executive branch officials.

Subpart B summarizes the procedures for the issuance of new guidance documents, posting of guidance documents to OGE's website, the process by which a person may submit petitions for the modification or withdrawal of existing guidance documents, and the manner in which OGE will respond to such petitions. Additionally, this Subpart states that OGE will not cite, use, or rely on guidance documents that have been rescinded, withdrawn, or removed through modification, except to establish historical facts or as a matter of comparison to current guidance.

Subpart C describes the process for the issuance and designation of significant guidance documents, as defined in Subpart A, and indicates that significant guidance documents are subject to notice and public comment, as well as responses to those comments. Finally, this Subpart identifies classes of documents that are categorically excluded from the definition of "guidance document" at § 2611.102, which were developed in consultation with OMB.

5 CFR Part 2638 – Amendments to Written Guidance Descriptions

OGE's regulation at 5 CFR § 2638.208 currently describes various forms of written guidance that OGE issues regarding its legal interpretations, program requirements, and educational offerings. Last amended in 2016, this provision utilized the term "guidance documents" before it became a specific term of art in Executive Order 13891. Although no substantive change is intended, OGE is amending § 2638.208 to replace the term "guidance documents" with the phrase "written guidance" in order to reduce any potential confusion.

II. Matters of Regulatory Procedure

Administrative Procedure Act

Pursuant to 5 U.S.C. 553(b)(3)(A), as Director of the Office of Government Ethics, the notice and comment procedures are being waived because these amendments concern matters of agency organization, procedure and practice.

Regulatory Flexibility Act

As the Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this final rule would not have a significant economic impact on a substantial number of small entities because it primarily affects current Federal executive branch employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this regulation does not contain information collection requirements that require approval of the Office of Management and Budget.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 5, subchapter II), this final rule would not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

Executive Order 13563 and Executive Order 12866

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select the regulatory approaches that maximize net benefits (including economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. In promulgating this rulemaking, OGE has adhered to the regulatory philosophy and the applicable principles of regulation set forth in Executive Orders 12866 and 13563. The rule is not a significant regulatory action for the purposes of Executive Order 12866.

Executive Order 12988

As Director of the Office of Government Ethics, I have reviewed this rule in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

Executive Order 13771

This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

List of Subjects

5 CFR Part 2611

Administrative practice and procedure, Guidance documents, Significant guidance documents.

5 CFR Part 2638

Administrative practice and procedure, Conflict of interests, Government employees, Reporting and recordkeeping requirements.

Approved: July 24, 2020

Emory Rounds,

Director, U.S. Office of Government Ethics.

For the reasons stated in the preamble, the U.S. Office of Government Ethics amends 5 CFR chapter XVI as set forth below:

1. Add part 2611 to subchapter A to read as follows:

**PART 2611—GUIDANCE DOCUMENTS ISSUED BY THE OFFICE OF
GOVERNMENT ETHICS**

Subpart A—General Provisions

Sec.

2611.101 Purpose.

2611.102 Definitions.

2611.103 No private right of action or right to judicial review.

Subpart B—Procedures Related to Guidance Documents

2611.201 Designation and marking of guidance documents.

2611.202 Public access to guidance documents.

2611.203 Petitions regarding guidance documents.

2611.204 Use of rescinded, withdrawn, and modified guidance documents.

Subpart C—Significant Guidance Documents

2611.301 Designation of significant guidance documents.

2611.302 Public notice and comment on significant guidance documents.

2611.303 Classes of documents categorically excluded.

Authority: 5 U.S.C. App. 101-505; E.O. 13891, 84 FR 55235.

Subpart A—General Provisions

§ 2611.101 Purpose.

This part governs the issuance of guidance documents and significant guidance documents by the U.S. Office of Government Ethics (OGE) which are issued after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. This part implements Executive Order 13891, “Promoting the Rule of Law through Improved Agency Guidance Documents,” and guidance of the Office of Management and Budget.

§ 2611.102 Definitions.

For purposes of this part,

Director means the Director of OGE, or his or her delegate.

Government ethics laws and regulations include, among other applicable authorities, the provisions related to government ethics or financial disclosure set forth in the following authorities:

- (1) Chapter 11 of title 18 of the United States Code;
- (2) The Ethics in Government Act of 1978 (Pub. L. 95-521, as amended);
- (3) The Representative Louise McIntosh Slaughter Stop Trading on Congressional Knowledge Act (STOCK Act) (Pub. L. 112-105, as amended);
- (4) Executive Order 12674 (Apr. 12, 1989) as amended by Executive Order 12731 (Oct. 17, 1990); and
- (5) Subchapter B of Chapter 16 of title 5 of the United States Code.

Guidance document refers to any statement of agency policy or interpretation concerning a statute, regulation, or technical matter within the jurisdiction of the agency that is intended to have general applicability and future effect, but which is not intended to have the force or effect of law in its own right and is not otherwise required by statute to satisfy the rulemaking procedures specified in 5 U.S.C. 553 or 5 U.S.C. 556. The term

is not confined to written documents; guidance may come in a variety of forms, including (but not limited to) letters, memoranda, circulars, bulletins, advisories, and may include video, audio, and web-based formats. The term *guidance document* does not include:

- (1) Rules exempt from rulemaking requirements under 5 U.S.C. 553(a);
- (2) Rules of agency organization, procedure, or practice;
- (3) Decisions of agency adjudications under 5 U.S.C. 554 or similar statutory provisions;
- (4) Internal executive branch legal advice or legal advisory opinions addressed to executive branch officials;
- (5) Agency statements of specific applicability, including advisory or legal opinions directed to particular parties about circumstance-specific questions (e.g., informal advisory opinions, case or investigatory letters responding to complaints, warning letters), notices regarding particular locations or facilities (e.g., guidance pertaining to the use, operation, or control of a government facility or property), and correspondence with individual persons or entities (e.g., congressional correspondence), except documents ostensibly directed to a particular party but designed to guide the conduct of the broader regulated public;
- (6) Legal briefs, other court filings, or positions taken in litigation or enforcement actions;
- (7) Agency statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation, including speeches and individual presentations, editorials, media interviews, press materials, or congressional

testimony that do not set forth for the first time a new regulatory policy;

(8) Guidance pertaining to military or foreign affairs functions;

(9) Grant solicitations and awards;

(10) Contract solicitations and awards; or

(11) Purely internal agency policies or guidance directed solely to OGE

employees or contractors or to other Federal agencies that are not intended to have substantial future effect on the behavior of regulated parties.

Note 1 to the definition of “guidance document”: As described in 5 CFR part 2638, OGE issues a number of documents to agency ethics officials and officers and employees of the executive branch concerning the government ethics laws and regulations and ethics program management. These documents are generally exempted from the definition of guidance document pursuant to this definition. In the rare case that a document does constitute a guidance document not otherwise excluded from the definition, the procedures set forth in this part will apply.

OGE means the U.S. Office of Government Ethics, or the organizational unit within the office responsible for conducting the relevant provisions of this part.

Significant guidance document means a guidance document that will be disseminated to regulated entities or the general public and that may reasonably be anticipated:

(1) To lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the U.S. economy, a sector of the U.S. economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) To create serious inconsistency or otherwise interfere with an action taken or planned by another Federal agency;

(3) To alter materially the budgetary impact of entitlements, grants, user fees, or

loan programs or the rights and obligations of recipients thereof; or

(4) To raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866, as further amended.

§ 2611.103 No private right of action or right to judicial review.

This part is intended to improve the internal management of OGE. As such, it is for the use of OGE personnel only and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, its officers or employees, or any other person.

Subpart B—Procedures Related to Guidance Documents

§ 2611.201 Designation and marking of guidance documents.

(a) *Designation of guidance documents.* OGE will determine whether a document constitutes a guidance document prior to issuance.

(b) *Marking of guidance documents.* All guidance documents will:

- (1) Identify the activity and entities to which the guidance applies;
- (2) Note if the guidance document revises a previously issued guidance document and the guidance document which it revises or replaces;
- (3) Include a summary of the subject matter covered by the guidance document;
- (4) Include a citation to the statutes and regulations to which the guidance applies;
- (5) Include a unique identifier;
- (6) Include a title;
- (7) Identify the date of issuance or revision;

(8) Include the term “guidance”; and

(9) Include a clear and prominent statement declaring that the contents of the document do not have the force and effect of law and are not meant to bind the public in any way, and the document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. To the extent to which a guidance document provides an interpretation of the government ethics laws and regulations or concerns aspects of ethics program management, the statement will note that such provisions are controlling within the executive branch.

(c) *Avoidance of mandatory language.* Guidance documents will avoid using mandatory language, such as “shall,” “must,” “required,” or “requirement,” unless the language is describing an established statutory or regulatory requirement and will not foreclose OGE’s consideration of positions advanced by affected private parties.

§ 2611.202 Public access to guidance documents.

(a) *Posting of guidance documents on OGE website.* Guidance documents issued by OGE and in effect will be maintained on, and retrievable from, OGE’s website, www.oge.gov/guidance.

(b) *Guidance document portal.* The guidance document portal will include a clearly visible disclaimer stating the following:

(1) Guidance documents lack the force and effect of law, unless expressly authorized by statute or incorporated into a contract;

(2) To the extent that a guidance document provides an interpretation of the government ethics laws and regulations or concerns aspects of ethics program management, such provisions are controlling within the executive branch; and

(3) OGE may not cite, use, or rely on any guidance document that is not posted on OGE's website except to establish historical facts.

(c) *Rescinded guidance documents.* Guidance documents that are not maintained on OGE's website are considered rescinded and may not be cited, used, or relied upon except to establish historical facts.

§ 2611.203 Petitions regarding guidance documents.

(a) *Petition regarding modification or withdrawal of previously issued guidance.*

Any person may petition OGE to modify or withdraw a particular OGE guidance document. Petitions filed under this section must meet the criteria set forth in paragraph (b) of this section. OGE will respond to petitions in a timely manner, no later than 90 days after receipt of the petition.

(b) *Required information for petition.* A petition filed under this section must:

(1) Be submitted to OGE through one of the below two methods:

(i) By paper submission addressed to "General Counsel, U.S. Office of Government Ethics, Suite 500, Washington DC 20005-3917," with the words "Petition for Withdrawal or Modification of Guidance Document" at the top of the submission; or

(ii) By electronic submission to usoge@oge.gov and addressed to "General Counsel, U.S. Office of Government Ethics," with the words "Petition for Withdrawal or Modification of Guidance Document" in the subject line of the message.

(2) Describe the nature of the request and set forth the text or substance of the guidance document or specify the guidance document, or portion of the guidance document, that the petitioner seeks to have modified or withdrawn, as the case may be;

(3) Explain the interest of the petitioner in the action requested;

(4) Contain any information and arguments available to the petitioner to support the action sought, including any alternative text or alternative interpretations and the legal basis for such text or interpretation; and

(5) Provide contact information for the petitioner.

(c) *Review of petition.* Each petition received under this section will be referred to the head of the division responsible for the subject matter of that petition. No hearing, argument, or other proceeding is required to be held on a petition before its disposition under this section.

(d) *Grant of petition.* The Director may grant a petition upon a determination that the petition contains adequate justification to warrant modification or withdrawal of the guidance document or portions of the guidance document. The Director, in his or her sole discretion, may determine that only a partial grant of the petition is appropriate. Modifications to guidance documents will comply with § 2611.201. Modifications to significant guidance documents will comply with subpart C of this part.

(e) *Denial of petition.* The Director may deny a petition or parts of a petition when the petition lacks adequate justification to warrant modification or withdrawal of a guidance document, calls for action that is inconsistent with law or regulation or is beyond OGE's statutory jurisdiction, seeks modification or withdrawal of a document that is not a guidance document, or lacks the required information set forth in paragraph (b) of this section.

(f) *Notification to petitioner.* Following a determination that a petition will be granted or denied, OGE will issue notification of the grant or denial to the petitioner at the address provided by the petitioner in paragraph (b) of this section explaining the

reason for the determination. In the event that a petition is received by electronic mail, OGE will send notification to the electronic mail address from which the petition was received.

(g) *Publication of petitions.* In the event that OGE grants a petition under this section, OGE may publish the petition, including attachments and other supporting materials, on OGE's website, www.oge.gov. Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Petitions generally will not be edited to remove any identifying or contact information.

§ 2611.204 Use of rescinded, withdrawn, and modified guidance documents.

OGE will not cite, use, or rely on guidance documents or portions of guidance documents that are rescinded, withdrawn, or removed through modification, except to establish historical facts or as a matter of comparison to current guidance. Upon petition or its own initiative, OGE may reinstate guidance documents or portions of guidance documents previously rescinded, withdrawn, or modified, in conformity with the procedures in this part.

Subpart C—Significant Guidance Documents

§ 2611.301 Designation of significant guidance documents.

(a) *Designation of significant guidance documents.* The Director will submit proposed guidance documents to the Office of Information and Regulatory Affairs, Office of Management and Budget to determine whether the guidance document is a significant guidance document, as defined in § 2611.102, in the same fashion used to determine whether a rulemaking undertaken pursuant to 5 U.S.C. 553 is significant for purposes of Executive Order 12866.

(b) *Compliance with applicable Executive Orders.* Significant guidance documents will demonstrate compliance with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in Executive Order 12866, Executive Order 13563, Executive Order 13609, Executive Order 13771, and Executive Order 13777.

(c) *Issuance of significant guidance documents.* Significant guidance documents will be approved by the Director, or by an official who is serving as Director in an acting capacity, on a non-delegable basis.

§ 2611.302 Public notice and comment on significant guidance documents.

(a) *Public notice and comment.* Except as provided in paragraph (c) of this section, proposed OGE guidance documents that have been deemed significant guidance documents will be published in the Federal Register and interested persons will be invited to provide public comment in the form of written data, views, or arguments for or against the proposed significant guidance document. The comment period on guidance documents will be open for a minimum of 30 days. OGE will also post draft significant guidance documents on its website.

(b) *Responses to comments.* OGE will respond to major concerns raised in public comments received. Responses and comments will be posted to OGE's website, either before or at the time that the final significant guidance documents is issued.

(c) *Exemption for good cause shown.* The requirements of paragraph (a) of this section will not apply to any significant guidance document or categories of significant guidance documents for which OGE finds, in coordination with the Office of Management and Budget, good cause that notice and public procedure thereon are

impracticable, unnecessary, or contrary to the public interest. Significant guidance documents that are issued without public notice and comment under this paragraph shall include the finding of good cause and a brief statement or reasons thereof.

§ 2611.303 Classes of documents categorically excluded.

OGE has generally determined that the following classes of documents are not guidance documents defined in § 2611.102:

- (a) Legal advisories;
- (b) Informal advisory opinions and letters;
- (c) Formal advisory opinions; and
- (d) Guides only directed to agency ethics officials and current Federal

employees.

PART 2638—EXECUTIVE BRANCH ETHICS PROGRAM

2. The authority citation for part 2638 continues to read as follows:

Authority: 5 U.S.C. App. 101-505; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

3. Revise § 2638.208 to read as follows:

§ 2638.208 Written guidance on the executive branch ethics program.

This section describes several means by which the Office of Government Ethics provides agencies, employees, and the public with written guidance regarding its legal interpretations, program requirements, and educational offerings. Normally, written guidance is published on the official website of the Office of Government Ethics, www.oge.gov.